Supreme Court, U.S.
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No. 96-1503

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PAMELA J. MCLEOD,

Petitioner,

v.

OREGON LITHOPRINT, INC., dba
NEWS-REGISTER PUBLISHING CO., and
NEWS-REGISTER EMPLOYEES' INSURANCE PLAN

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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11 pp

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent companies and no subsidiaries that are not wholly owned.

CONTENTS

I. Statement of the Case 1

II. Reasons for Denying Review 2

III. Conclusion 7

AUTHORITIES

Cases

Armstrong v. Jefferson Smurfit Corp.,
30 F.3d 11 (1st Cir. 1994) 4

Fraser v. Lintas: Campbell-Ewald,
56 F.3d 722 (6th Cir. 1995),
cert. denied, ___ U.S. ___,
116 S.Ct. 477 (1995) 5

Hein v. F.D.I.C.,
88 F.3d 210 (3rd Cir. 1996), cert. denied
__ U.S. __, 117 S.Ct. 683 (1997) 4

Lee v. Burkhart,
991 F.2d 1004 (2nd Cir. 1993) 5

Mertens v. Hewitt Associates,
508 U.S. 248, 113 S.Ct. 2063,
24 L.Ed.2d 161 (1993) . . . . . passim

Novak v. Andersen Corp.,
962 F.2d 757 (8th Cir. 1992), cert. denied
__ U.S. __, 113 S.Ct. 2928 (1993) 5

Warren v. Society Nat. Bank,
905 F.2d 975 (6th Cir. 1990)
cert. denied 500 U.S. 952 (1991) 5-6

Zimmerman v. Sloss Equip., Inc.,
72 F.3d 822 (10th Cir. 1995) 5

AUTHORITIES (cont.)

Statutes

29 U.S.C. § 1132(a)(3) . . . . . passim

I. STATEMENT OF THE CASE

Petitioner misstates the question. The question presented -- i.e., the question the pleadings raised, the parties briefed, and the Court of Appeals decided (against petitioner) -- is whether compensatory damages are available under section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. § 1132(a)(3), which gives retirement plan participants a right of action against plan fiduciaries for "appropriate equitable relief."[1]

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[1] Section 502 reads:

> (a) *Persons empowered to bring a civil action*
>
> A civil action may be brought --
>
> . . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

II. REASONS TO REVIEW

The Court should deny review because the question presented -- does "appropriate equitable relief" include compensatory damages? -- has already been answered, and not so very long ago, in Mertens v. Hewitt Assoc., 508 U.S. 248 (1993). Mertens held that "equitable relief" refers to those categories of relief that were "typically" available in equity -- injunction, mandamus, and restitution -- and does not include damages, 508 U.S. at 256-58, which is all petitioner seeks. She wants respondents to pay her a sum of money equal to the benefits she would have received under the cancer insurance policy that she says she would have bought if only respondents had told her she was eligible. That sum of money is damages, plain and simple, although petitioner strives to avoid that word. And it is not available under Section 502(a)(3), if Mertens is still authoritative.

Petitioner claims the relief she seeks is not really damages, but rather a form of restitution. Not so. Restitution is a procedure for compelling the return of misappropriated

funds, thus preventing unjust enrichment. Respondents have no funds belonging to petitioner even if they caused her to miss out on the cancer insurance policy, as she alleges. Although petitioner seeks a sum of money equal to the benefits she would have received under the policy, she does not seek the benefits themselves. Nor could she seek them -- at least not in this action -- because respondents don't have them. If anyone has them, it's the cancer insurer, not respondents. There being no ill-gotten funds and no unjust enrichment, there can be no restitution.

Petitioner says review is necessary to resolve a conflict in the circuits regarding the availability of damages under Section 502(a)(3). But there is no conflict, except among pre-Mertens cases, which are no longer good law. Every circuit that has considered this issue since Mertens has held that compensatory damages are not available in a Section 502(a)(3) action. See Armstrong v. Jefferson Smurfit Corp., 30 F.3d 11, 13 (1st Cir. 1994); Hein v. F.D.I.C., 88 F.3d 210, 224 (3rd Cir. 1996), cert. denied __ U.S. __, 117 S.Ct. 683 (1997);

Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 829 (10th Cir. 1995). Fraser v. Lintas: Campbell-Ewald, 56 F.3d 722, 725 (6th Cir. 1995), cert den, ___ U.S. ___, 116 S.Ct. 477 (1995).[2]

Plaintiff cites cases from the Third, Sixth, and Eighth Circuits, which hold, she says, that monetary relief is available under Section 502(a)(3). But with one exception, those were all actions to recover wrongfully withheld benefits from the benefit-provider, not, as here, actions for damages from some third party measured by the lost benefits. The one exception is Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990), cert. denied 500 U.S. 952 (1991), which squarely held that Section 502(a)(3) "permits the recovery of compensatory damages to address a direct injury to a participant by a fiduciary that allegedly violated its contractual duty under the terms of the retirement plans and under the provisions of ERISA." 905 F.2d at 981. But even the Sixth Circuit now concedes that, in light

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[2] Two other circuits anticipated Mertens and rejected damages claims under Section 502(a)(3) before this Court's ruling in that case: Lee v. Burkhart, 991 F.2d 1004, 1011 (2nd Cir. 1993), and Novak v. Andersen Corp., 962 F.2d 757, 760-61 (8th Cir. 1992), cert. den. __ U.S. __, 113 S.Ct. 2928 (1993).

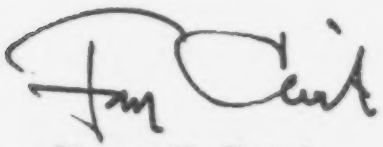
of Mertens, Warren is no longer good law. "In our view," the court said recently, "Mertens effectively overrules Warren." Fraser v. Lintas: Campbell-Ewald, 56 F.3d at 725.

Without a true, inter-circuit conflict, there is no reason for the Court to hear this case, unless it is prepared to overturn Mertens so soon after it was decided. But petitioner offers no good reason for doing so. She complains that, unless Mertens is disturbed, plan participants will be left without a remedy for misdeeds and mistakes of plan fiduciaries. But even with Mertens plan participants are not remediless; they are still entitled to "appropriate equitable relief." If that remedy is generally inadequate -- and petitioner has not shown that it is, she merely speculates to that effect -- then she should apply to Congress for a change in the law. It is not for the courts to correct perceived "problems" in statutory language, especially when the language is part of "an enormously complex and detailed statue that resolve[s] innumerable disputes between powerful competing interests." Mertens, 508 U.S. at 262.

III. CONCLUSION

The Court should deny the petition.

Respectfully submitted,



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